RECORD AND BRIEF

FILED
AUG - 4 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-1161

In The

Supreme Court of the United States

Beverly R. Gill, et al.,

Appellants,

v.

William Whitford, et al.,

Appellees.

On Appeal from the United States District Court for the Western District of Wisconsin

Brief of the American Civil Rights Union and the Public Interest Legal Foundation as *Amici Curiae* in Support of Appellants

J. Christian Adams
Counsel of Record
Kaylan L. Phillips
PUBLIC INTEREST LEGAL FOUNDATION
32 E. Washington St., Ste. 1675
Indianapolis, IN 46204
(317) 203-5599
adams@publicinterestlegal.org
Counsel for Amici Curiae American Civil Rights Union and Public Interest Legal Foundation

Table of Contents

Table of Authorities ii

Interests of *Amici Curiae* 1

Summary of the Argument 2

Argument 3

I. The Constitution Grants the States the Power Over Elections. 3

II. Allowing a Federal Cause of Action Under the First and Fourteenth Amendment for Partisan Gerrymandering Upsets This Constitutional Balance 4

Conclusion 9

Table of Authorities

Cases

Ariz. v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247 (2013) 3-4

Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015) 3

Chapman v. Meier, 420 U.S. 1 (1975) 4

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 4

Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) 7

Perry v. Perez, 132 S. Ct. 934 (2012) 8

Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 6

Reynolds v. Sims, 377 U.S. 533 (1964) 4

Shelby County. v. Holder, 679 F.3d 848 (2012) 4

Shelby County. v. Holder, 133 S. Ct. 2612 (2013) 6-8

Smiley v. Holm, 285 U.S. 355 (1932) 3

Vieth v. Jubelirer, 541 U.S. 267 (2004) 7-8

Statutes and Constitutional Provisions

U.S. Const., Art. I, § 2, cl. 1 3

U.S. Const., Art. I, § 4, cl. 1 ..... 2, 4

U.S. Const., Art. II, § 1, cl. 2 3

Seventeenth Amendment 3

Other Authorities

A. Bickel, The Morality of Consent (1975) 6

Table of Authorities

Cases

Ariz. v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247 (2013) 3-4

Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015) 3

Chapman v. Meier, 420 U.S. 1 (1975) 4

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 4

Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) 7

Perry v. Perez, 132 S. Ct. 934 (2012) 8

Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 6

Reynolds v. Sims, 377 U.S. 533 (1964) 4

Shelby County. v. Holder, 679 F.3d 848 (2012) 4

Shelby County. v. Holder, 133 S. Ct. 2612 (2013) 6-8

Smiley v. Holm, 285 U.S. 355 (1932) 3

Vieth v. Jubelirer, 541 U.S. 267 (2004) 7-8

Statutes and Constitutional Provisions

U.S. Const., Art. I, § 2, cl. 1 3

U.S. Const., Art. I, § 4, cl. 1 ..... 2, 4

U.S. Const., Art. II, § 1, cl. 2 3

Seventeenth Amendment 3

Other Authorities

A. Bickel, The Morality of Consent (1975) 6

Interests of *Amici Curiae*[1]

Amicus Curiae American Civil Rights Union (ACRU) is a non-partisan 501(c)(3) tax-exempt organization dedicated to protecting the civil rights of all Americans by publicly advancing a Constitutional understanding of our essential rights and freedoms. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues and election matters in cases nationwide.

The ACRU Policy Board sets the policy priorities of the organization, and includes some of the most distinguished statesmen in the Nation on matters of free speech and election law. Current Policy Board members include: the 75th Attorney General of the United States, Edwin Meese III; Charles J. Cooper, the former Assistant Attorney General for the Office of Legal Counsel, William Bradford Reynolds, the former Assistant Attorney General for the Civil Rights Division; J. Kenneth Blackwell, the former

---

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici curiae* and its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. Appellants and Appellees have consented to the filing of timely *amicus curiae* briefs in support of either party or neither party.

U.S. Ambassador to the United Nations Human Rights Commission and Ohio Secretary of State; former Voting Rights Section attorney, U.S. Department of Justice, J. Christian Adams; and former Counsel to the Assistant Attorney General for Civil Rights and former member of the Federal Election Commission Hans von Spakovsky.

Amicus Curiae Public Interest Legal Foundation (the Foundation) is a non-partisan 501(c)(3) tax-exempt organization dedicated to promoting the integrity of American elections and preserving the constitutional balance giving states control over their own elections. The Foundation files *amicus curiae* briefs as a means of advancing its purpose and has appeared as *amicus curiae* in numerous cases in federal courts throughout the country. The Foundation employs or is affiliated with national election law experts, scholars, and practitioners.

This case is of interest to ACRU and the Foundation because both organizations are concerned with protecting the sanctity and integrity of American elections and preserving the Constitutional balance of state control over their own elections.

Summary of the Argument

Pursuant to U.S. Const., Art. I, § 4, cl. 1, "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." The Constitution's Election Clause, as it is commonly known, gives the States the power to run their elections, with the Congress allowed only *limited* power with respect to regulations concerning the

"Times, Places, or Manner" of holding federal elections. U.S. Const., Art. I, § 4, cl. 1; *see also* Seventeenth Amendment and U.S. Const., Art. II, § 1, cl. 2. In this area, Congress's power to regulate is superior to the States' power *only* when the regulations cannot be reconciled. That is, Congress's regulations "supersede those of the State which are inconsistent therewith." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2254 (2013) ("*ITCA*").

As this Court has "observed, redistricting 'involves lawmaking in its essential features and most important aspect.'" *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2667 (2015) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). The lower court invited unlimited federal intrusion into a core Constitutional power granted to the States without Congress expressly permitting the intrusion.

Argument

I. The Constitution Grants the States the Power Over Elections.

The power to regulate federal elections is directed by the Constitution. To the States, the Framers granted exclusively the authority to control who may vote in federal elections. *See* U.S. Const., Art. I, § 2, cl. 1 (election of Representatives), Seventeenth Amendment (election of Senators), and U.S. Const., Art. II, § 1, cl. 2 (presidential electors chosen as directed by state legislatures).

With respect to *how* federal elections are conducted, the Framers divided authority between Congress and the States. Under the Constitution's

Election Clause, Congress may regulate the "Times, Places, or Manner" of holding federal elections. U.S. Const., Art. I, § 4, cl. 1; *ITCA*, 133 S. Ct. at 2257 ("[T]he Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them."). Congress's power to regulate *how* elections are held, however, is only superior to the States' power to do the same when they differ. That is, Congress's regulations "supersede those of the State which are inconsistent therewith." *Id.* at 2254. Unquestionably, the responsibility of redistricting remains with the States. *See Chapman v. Meier*, 420 U.S. 1, 27 (1975) ("We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.").

To be sure, the States' power of redistricting is not absolute. It is subject to certain constitutional and statutory standards, often involving systems prohibited by the Fifteenth Amendment or well established Fourteenth Amendment protections. *See, e.g., Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960) ("When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment") and *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.") *See also* J.S. Appendix A 6-7a.

II. Allowing a Federal Cause of Action Under the First and Fourteenth Amendment for Partisan Gerrymandering Upsets This Constitutional Balance.

The lower court's invalidation of Wisconsin's redistricting plan, however, was not based on well-established constitutional principles. Instead, the lower court based its decision on partisan gerrymandering grounds, finding "that Act 43 was intended to burden the representational rights of Democratic voters throughout the decennial period by impeding their ability to translate their votes into legislative seats." J.S. Appendix A 3a. The panel below recognized the significance of their departure from a federalist perspective, J.S. Appendix A 108a, yet found that "the First Amendment and the Equal Protection clause prohibit a redistricting scheme which (1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds." J.S. Appendix A 109-110a. The panel based its admittedly novel conclusion not on a finding of discrimination abhorrent to deeply rooted constitutional principles but on its finding that the drafters of the plan intended "to entrench the Republican Party in power." J.S. Appendix A 140a. Such a finding, built on a shaky foundation, at best, upsets the delicate balance of power agreed upon in 1787 and should be reversed.

The panel's departure from federalist principles cannot be reconciled with this Court's recent reaffirmance of the original constitutional arrangement which gave states the general power to

manage their own elections subject to explicit and well defined exceptions. In *Shelby County. v. Holder*, this Court considered whether Section 4 of the Voting Rights Act of 1965, the formula by which covered jurisdictions were chosen for the Act's "preclearance" requirement for changes in voting procedures pursuant to Section 5. 133 S. Ct. 2612, 2619-20 (2013). Ultimately, the Court determined that Section 4 was unconstitutional. *Id.* at 2631. In so finding, the Court acknowledged that Section 5, which "required States to obtain federal permission before enacting any law related to voting[,]" was "a drastic departure from basic principles of federalism." *Id.* at 2618.

In the context of Section 5, while "[t]he Federal Government does not...have a general right to review and veto state enactments before they go into effect[,]" *Shelby County*, 133 S. Ct. at 2623, there were "exceptional conditions" that merited the "uncommon exercise of congressional power," *id.* at 2624 (quotations and citations omitted).

"The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem"—racial discrimination in voting. *Shelby County.*, 133 S. Ct. at 2618. "'The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.'" *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 n.35 (1978) (quoting A. Bickel, The Morality of Consent 133 (1975)).

The fact that Section 4 "applied [Section 5] only to some States" was "an equally dramatic departure

from the principle that all States enjoy equal sovereignty." *Shelby County.*, 133 S. Ct. at 2618. But such "strong medicine" was chosen in order "to address entrenched racial discrimination in voting, 'an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.'" *Id.* (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).) As Judge Williams noted in his dissent in the D.C. Circuit case later reversed by the Supreme Court, "the federalism costs of § 5 are 'substantial.'" *Shelby County. v. Holder*, 679 F.3d 848, 885 (2012) (J. Williams, dissenting) (citing *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009)). The federalism costs of shifting power away from the States and to the judiciary regarding redistricting are also substantial.

It is now axiomatic that there is no room for racial discrimination in the electoral process. Remarkably, the panel here understood that this Court has found that the same cannot be said about partisanship in the redistricting process:

> The plurality in *Vieth* [*v. Jubelirer*, 541 U.S. 267 (2004)], for instance, noted that "partisan districting is a lawful and common practice." 541 U.S. at 286. In his opinion, Justice Kennedy observed that political classifications are "generally permissible." *Id.* at 307 (Kennedy, J., concurring in the judgment). Justices Souter and Breyer, dissenting in *Vieth*, expressed the view that partisan favoritism in some form was inevitable, if not necessarily desirable. *See id.* at 344 (Souter, J., dissenting) ("[S]ome intent to gain political

> advantage is inescapable whenever political bodies devise a district plan ...."); *id.* at 360 (Breyer, J., dissenting) ("[T]raditional or historically based boundaries are not, and should not be, 'politics free.' ... They ... represent an uneasy truce, sanctioned by tradition, among different parties *seeking political advantage*." (emphasis added)).

J.S. Appendix A 112a-113a. Certainly, the complaints of the Appellees can thus hardly be said to describe an "extraordinary problem" akin to the racial discrimination that warranted the "unprecedented" measures of the Voting Rights Act. *Shelby County*, 133 S. Ct. at 2618. Yet the lower court afforded the same or *more* protections for perceived political advantage than is due for deeply rooted constitutional protections.

The lower court's "drastic departure from basic principles of federalism[,]" *Shelby County*, 133 S. Ct. at 2618, however, cannot withstand constitutional scrutiny. While the power exercised at issue in *Shelby* did not involve redistricting, this Court expressly acknowledged that it is an important function within the States' control. *See Shelby County*, 133 S. Ct. at 2623 ("Drawing lines for congressional districts is likewise 'primarily the duty and responsibility of the State.'" (quoting *Perry v. Perez*, 132 S. Ct. 934 (2012)).) Moreover, Appellees seek a similar outcome to those defending the preclearance requirement, wherein a federal court can deem a duly enacted state redistricting plan not to their liking and effectively block it. This is an affront to the important federalist balance reaffirmed in *Shelby* and should be rejected.

Conclusion

For the following reasons, *amici* urge that this Court reverse the lower court's decision.

Respectfully submitted,

J. Christian Adams
Counsel of Record
Kaylan L. Phillips
PUBLIC INTEREST LEGAL FOUNDATION
32 E. Washington St., Ste. 1675
Indianapolis, IN 46204
(317) 203-5599
adams@publicinterestlegal.org
Counsel for Amici Curiae American Civil Rights Union and Public Interest Legal Foundation

August 4, 2017